

UNITED STATES DISTRICT COURT  
DISTRICT OF RHODE ISLAND

MEE H. JUNG	:	
	:	
v.	:	C.A. No. 17-295WES
	:	
DEUTSCHE BANK NATIONAL TRUST	:	
COMPANY as Trustee for RESIDENTIAL	:	
ACCREDITLOANS, INC. MORTGAGE	:	
ASSET-BACKED PASS-THROUGH	:	
CERTIFICATES SERIES 2007-QS8, PNC	:	
MORTGAGE, PNC BANK, N.A., PNC	:	
FINANCIAL SERVICES GROUP, INC.,	:	
and DALIA GIEDRIMIENE	:	

**REPORT AND RECOMMENDATION**

Lincoln D. Almond, United States Magistrate Judge

Pending before me for a report and recommendation (28 U.S.C. § 636(b)(1)(B)) is Defendants' Motion to Dismiss. (ECF Doc. No. 5). Plaintiff opposes the Motion. (ECF Doc. No. 7).

**Background**

This is the third post-foreclosure lawsuit that Plaintiff Mee H. Jung has filed to challenge a March 7, 2014 foreclosure sale of property located at 397-399 Hope Street in Providence. The first lawsuit was filed on March 10, 2014 against Deutsche Bank and Mortgage Electronic Registration Systems, Inc. ("MERS"). Jung v. Deutsche Bank, C.A. No. 1:14-CV-00124-JJM-LDA (D.R.I.). In the 2014 case, Plaintiff claimed that the foreclosure was void due to allegations of lack of standing to foreclose and invalid assignments of the mortgage by MERS.

On September 16, 2014, Plaintiff filed a notice of voluntary dismissal pursuant Rule 41(a)(1), Fed. R. Civ. Proc.

The second lawsuit was filed on April 13, 2016 against Deutsche Bank and Ocwen Loan Servicing. Jung v. Deutsche Bank, C.A. No. 1:16-CV-00232-JJM-LDA (D.R.I.). In the 2016 case, Plaintiff attacked the same 2014 foreclosure sale. Plaintiff alleged breach of contract and a claim to quiet title based on an allegedly void foreclosure and foreclosure deed. She specifically claimed that the foreclosure was “invalid because the Lender failed to give notice in accordance with the terms of the Mortgage [a]s set forth in paragraph 22 of the mortgage.” (ECF Doc. No. 1-1 at ¶ 34). Although PNC Bank is not a named defendant in the 2016 case, it is referenced in Plaintiff’s allegations.

Defendants moved to dismiss the 2016 lawsuit on July 29, 2016. Plaintiff obtained an extension of time to respond and then on August 26, 2016 filed a “Voluntary Motion to Dismiss” stating that “upon review of the current exhibits presented by Defendants in their Motion to Dismiss, at this time she seeks to voluntarily dismiss her claims.” The request was granted, and the case dismissed on August 29, 2016.

The instant and third lawsuit was filed on May 4, 2017 against Deutsche Bank, PNC Mortgage, PNC Bank, PNC Financial Services and Dalia Giedrimiene (the third-party purchaser of 397-399 Hope Street). Jung v. Deutsche Bank, C.A. No. 1:17-CV-00295-WES-LDA (D.R.I.). In the instant case, Plaintiff again challenges the 2014 foreclosure and seeks to quiet title. She again challenges the legal sufficiency of the paragraph 22 notice.

### **Discussion**

Defendants bring two arguments for dismissal. First, their primary argument is that this Complaint is barred by res judicata because, pursuant to Rule 41(a)(1)(B), Fed. R. Civ. Proc., the

voluntary dismissal of the 2016 Complaint operated as an adjudication on the merits and terminated the case with prejudice. Second, they also contend that PNC, as servicer for Deutsche Bank, did in fact strictly comply with paragraph 22 of the Mortgage and therefore, Plaintiff fails to state a claim for relief. Since Defendants' primary argument is plainly dispositive, the paragraph 22 notice issue is not addressed herein.

Defendants seek to invoke Rule 41's so-called "two-dismissal" rule. Rule 41 governs the dismissal of actions and the effect of such dismissals. Pursuant to Rule 41(a)(1), a plaintiff may unilaterally and voluntarily dismiss an action without a court order by filing a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment. Such dismissal is generally "without prejudice." Plaintiff terminated her 2014 lawsuit in this manner.

In order to prevent the potential harassment of repeated dismissals without prejudice to refile, Rule 41(a)(1)(B) also provides that "if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits." "Because a notice of a second dismissal by the plaintiff serves as an 'adjudication upon the merits,' the doctrine of res judicata applies." Manning v. S.C. Dep't of Highway & Pub. Transp., 914 F.2d 44, 47 (4<sup>th</sup> Cir. 1990). Res judicata generally precludes the re-litigation of a claim adjudicated on the merits in a prior litigation.

In order to determine if the 2016 dismissal acts to bar this 2017 lawsuit, the Court must determine (1) if the 2014 lawsuit was "based on or including the same claim" as the 2016 lawsuit; and (2) if so, whether the dismissal of the 2016 lawsuit on the merits operates as res judicata as to this 2017 lawsuit. As discussed below, I find that the record unambiguously supports an affirmative determination on both accounts.

First, as to the “two-dismissal” rule, it has been held that it applies if the defendants in the consecutive cases are the same, substantially the same or in privity with each other. See, e.g., Am. Cyanamid Co. v. Capuano, 381 F.3d 6, 17 (1<sup>st</sup> Cir. 2004). “Parties are in privity when there is a commonality of interest between the two entities and when they sufficiently represent each other’s interests.” Duffy v. Milder, 896 A.2d 27, 36 (R.I. 2006). In these cases, Plaintiff has sued a mortgagee, Deutsche Bank, its purported servicers Ocwen and PNC, and an innocent third-party purchaser of the foreclosed property, Ms. Giedrimiene. Since they all have a commonality of interest with respect to Plaintiff’s attack on the validity of the 2014 foreclosure of 397-399 Hope Street, they are sufficiently in privity for purposes of the “two-dismissal” rule and res judicata.

The “two-dismissal” rule also applies only to previously dismissed actions “based on or including the same claim” as the pending action. “The relevant inquiry is not whether the claims identified in the various complaints match up exactly, but whether the two suits arise from the same transactional nucleus of facts such that the claims pleaded are all grounds for recovery which could have been asserted, whether they were or not, in a prior suit between the same parties. Melamed v. Blue Cross of California, No. CV11-4540PSG, 2012 WL 122828 at \*5 (C.D. Cal. Jan. 13, 2012); see also Rascoe v. APM Terminals Virginia, Inc., Civil No. 2:12CV352, 2013 WL 1332134 at \*4 (E.D. Va. March 29, 2013) (applying a transactional approach to the identity of claims question, i.e., “whether the new claim arises out of the same transaction or series of transactions” as the prior claim). Applying this standard, I conclude that there is a sufficient identity of claims between the 2014 and 2016 lawsuits to satisfy and trigger the “two-dismissal” rule. Thus, the 2016 “Voluntary Motion to Dismiss” operates as an adjudication on the merits pursuant to Rule 41(a)(1)(B), Fed. R. Civ. Proc.

Having made that determination, I turn to the res judicata analysis. Res judicata applies when there is (1) a final adjudication on the merits in an earlier suit; (2) sufficient identity of claims between the earlier and subsequent suit; and (3) sufficient identity between the parties in the two suits. See Cooke v. MERS, C.A. No. 12-831M, 2013 WL 2368846 at \*2 (D.R.I. May 29, 2013). As previously noted, the dismissal of the 2016 lawsuit was a final adjudication on the merits by operation of Rule 41(a)(1)(B), Fed. R. Civ. Proc. Further, as discussed previously, there is both an identity of parties and sufficient privity between the parties to all three lawsuits. Plaintiff sues the mortgagee Deutsche Bank in both her 2016 and 2017 lawsuits, she sues one of the loan servicers Ocwen in the 2016 lawsuit and another loan servicer PNC in the 2017 lawsuit, and finally she sues the innocent third-party purchaser of the foreclosed property in the 2017 lawsuit. All of these parties share a sufficient commonality of interest as to the validity of the 2014 foreclosure to satisfy the res judicata test.

Finally, as to identity of claims, both the 2016 and 2017 lawsuits seek to void the 2014 foreclosure and quiet title in the hands of Plaintiff. Both allege breach of contract including noncompliance with the notice requirements of paragraph 22 of the Mortgage. Applying the transactional approach, the claims in both the 2016 and 2017 lawsuits are sufficiently identical to satisfy the requirements of res judicata. See San Juan v. Wells Fargo Bank, No. C12-02529 CRB, 2013 WL 1501458 at \*2 (N.D. Cal. April 11, 2013) (finding identity of claims where three successive lawsuits all were based on claims related to a deed of trust for the same property).

### **Conclusion**

For the foregoing reasons, I conclude that Plaintiff's 2017 Complaint is barred by res judicata and thus recommend that Defendants' Motion to Dismiss (ECF Doc. No. 5) be

GRANTED and that Plaintiff's Complaint be DISMISSED WITH PREJUDICE as to all named parties.<sup>1</sup>

Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of the Court within fourteen days of its receipt. See Fed. R. Civ. P. 72(b); LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the District Court and the right to appeal the District Court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1<sup>st</sup> Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1<sup>st</sup> Cir. 1980).

/s/ Lincoln D. Almond  
LINCOLN D. ALMOND  
United States Magistrate Judge  
September 26, 2017

---

<sup>1</sup> Ms. Giedrimiene, the third-party purchaser has appeared pro se and filed a response to Plaintiff's Complaint which identifies the attorney who performed the "legal process of closing and the title search." (ECF Doc. No. 4). Although she has not formally moved to dismiss, the res judicata argument made by her co-Defendants applies equally to her. Out of deference to Ms. Giedrimiene's pro se status and balancing the equities, I recommend that the Court sua sponte dismiss this action also as to Ms. Giedrimiene on res judicata grounds.